No. 3379.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GUISEPPI PINASCO,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

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The plaintiff in error was indicted in the lower court for a violation of several sections of the Internal Revenue Law. In Count I it was charged that he carried on the business of a distiller without having given the bond required by law. In Count II it was charged that he carried on the business of a distiller without having given notice thereof to the Collector of Internal Revenue. In Count III it was charged that he unlawfully made and fermented mash fit for distillation and kept the same in his dwelling-house, which dwelling-house was not a distillery authorized by law. In Count IV it was charged that he used a still for the purpose of distilling in his dwelling-house. (Tr., pp. 2, 3 and 4.) The several counts of the indictment were based upon the same state of

facts. To this Indictment and to the several counts thereof the plaintiff in error interposed a motion to quash on the ground that each count failed to state facts sufficient to constitute an offense against the laws of the United States, and that the law under which the Indictment was framed was repealed by the Act of March 3, 1917, commonly known as the Reed Amendment, and on the further ground that there was then pending in the same court a proceeding entitled United States of America, Libelant, against One Machine for Corking Bottles, etc., No. 4537, for the condemnation of the property of plaintiff in error for the same offense or offenses charged in the Indictment and based upon the same state of facts. This motion to quash, after argument, was overruled by the lower court. (Tr., pp. 5, 6, 7 and 8.)

Thereafter the plaintiff in error interposed a motion to require the Government to elect whether to proceed in the condemnation proceeding or in the criminal case, the case now before this Court. This motion, after argument, was denied and exception taken and allowed. (Tr., pp. 9, 10 and 11.)

Thereafter the case proceeded regularly to trial and at its close the jury returned a verdict of guilty as to each of the counts contained in the Indictment. (Tr., pp. 12, 13 and 14.)

Thereafter a motion in arrest of judgment was interposed and denied and sentence imposed upon the first, second and fourth counts of the Indictment. A writ of error was then sued out and the cause is now before this Court for review. (Tr., pp. 15, 16, 17, 18 and 47.)

ASSIGNMENTS OF ERROR.

1. That the Court erred in overruling the demurrer of the defendant to Count No. I of said Indictment and in not sustaining said demurrer to said Count I of said Indictment.

2. That the Court erred in overruling the demurrer of the defendant to Count No. II of said Indictment and in not sustaining said demurrer to said Count II of said Indictment.

3. That the Court erred in overruling the demurrer of the defendant to Count No. III of said Indictment and in not sustaining said demurrer to said Count III of said Indictment.

4. That the Court erred in overruling the demurrer of the defendant to Count No. IV of said Indictment and in not sustaining said demurrer to said Count IV of said Indictment.

5. That the Court erred in overruling the demurrer of the defendant to said Indictment and in holding the defendant to trial on account thereof.

6. That the Court erred in overruling and in not sustaining the amended motion to quash the first count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and

the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

7. That the Court erred in overruling and in not sustaining the amended motion to quash the second count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

8. That the Court erred in overruling and in not sustaining the amended motion to quash the third count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

9. That the Court erred in overruling and in not sustaining the amended motion to quash the fourth count of said Indictment for the reasons that said count is indefinite, uncertain, insufficient in law, and

does not state specific or sufficient facts in law to constitute a crime or offense against the Government of the United States or the laws thereof; that the Act of Congress under which said offense is sought to be charged had, prior to the alleged commission of said offense and the return of said Indictment and the filing thereof, been by the Congress of the United States repealed both expressly and by implication.

10. That the Court erred in overruling the amended motion of the defendant to quash the whole of said Indictment in its entirety on the ground and for the reason that there was then and there pending in the United States District Court for the Western District of Washington, Northern Division, a proceeding then and there entitled: "United States of America, Libelant, vs. One Machine for Corking Bottles, One Blow-torch, One Remington 12-Gauge Repeating Shotgun of Slide Action, Two 50-Pound Boxes of Buena Fruita Brand Dried Raisins, Two Copper Kettles, One Rubber Hose, Eleven Hundred Dollars in Currency, One Cashier's Check for $600.00 Unendorsed. One One-man Cross-cut Saw, One Copper Still, Cap and Coil Complete," being No. 4537, said proceeding being a proceeding of condemnation of property of the defendant Guiseppi Pinasco, for the same offense charged and set forth in each of the counts in said Indictment herein; and reference is hereby expressly made to the files, records and proceedings in the office of the clerk of said court for uncertainty, and this motion was based and this assignment predicated upon the said files, records and proceedings in

said cause and upon the proceedings in the above-entitled criminal action.

11. That the Court erred in making and entering its order herein prior to the reception of any testimony upon the part of the Government in overruling the motion of the defendant to require the Government to elect the ground and cause upon which the Government would proceed to trial; that the Government should be required to elect and say whether it would then proceed with and try the defendant under the Indictment in said cause, or whether it would proceed with and try the proceeding pending in the above-entitled court and cause, known as Cause No. 4537, entitled "United States of America, Libelant, vs. One Machine for Corking Bottles, etc."

12. That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the Part of the Government in relation to Count No. I of said Indictment for the reason and upon the ground that said Count I does not state facts sufficient to constitute a crime.

13. That the Court erred, immediately prior to the introduction of any testimony upon the part of the Government, in overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. II of said Indictment for the reason and upon the ground that said Count II does not state facts sufficient to constitute a crime.

14. That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count No. III of said Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime.

15. That the Court erred in, immediately prior to the introduction of any testimony upon the part of the Government, overruling the objection of the defendant to the introduction of any testimony on the part of the Government in relation to Count IV of said Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime.

16. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count I of the Indictment for the reason and upon the ground that said Count I does not State facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

17. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count II of the Indictment for the reason and upon the ground that said Count II does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

18. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count III of the Indictment for the reason and upon the ground that said Count III does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

19. That, at the conclusion of the evidence of the Government, the Court erred in overruling the motion of the defendant that the Court should then and there instruct the jury to return a verdict of not guilty as to Count IV of the Indictment for the reason and upon the ground that said Count IV does not state facts sufficient to constitute a crime, and that there is not sufficient evidence to warrant a conviction thereon.

20. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count I of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

21. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count II of the Indictment upon the ground and for the reason that Count II of the

Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

22. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count III of the Indictment upon the ground and for the reason that Count III of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

23. That, at the conclusion of all of the testimony offered on behalf of both the Government and the defendant, the Court erred in overruling the motion of the defendant to instruct the jury to return a verdict of not guilty upon Count IV of the Indictment upon the ground and for the reason that Count IV of the Indictment does not state facts sufficient to constitute a crime, and that the testimony does not show the defendant to be guilty of any crime.

24. That the Court erred in overruling the motion interposed by the defendant in arrest of judgment on the Indictment herein upon which the defendant was convicted and upon each and every count thereof, upon the ground and for the reason that the facts therein stated do not constitute a crime or offense against the laws of the United States.

25. That the Court erred in sentencing the defendant upon Count I of the Indictment.

26. That the Court erred in sentencing the defendant upon Count II of the Indictment.

27. That the Court erred in sentencing the defendant upon Count IV of the Indictment.

ARGUMENT.

I.

The foregoing Assignments of Error will be grouped together for the purpose of argument, for the reason that they are all directed to the insufficiency of the several counts of the Indictment except those relating to the motion to elect, which will be discussed in a separate paragraph. The several counts of the Indictment are based upon alleged infractions of the Internal Revenue Law, and it is the contention of the plaintiff in error that the Internal Revenue Law, and particularly those sections upon which the prosecution in this case is based, have been repealed by later legislation. In the first place, it must be kept in mind that the Internal Revenue Law, so far as it was applicable to the manufacture and sale of distilled liquors, was enacted for the purpose of raising revenue, and although it contained a number of penal clauses and provisions, it has never been regarded in the light of a criminal statute. In *U. S.* v. *Norton,* 91 U. S. 566, this idea is briefly touched upon:

> "The precise question before us came under consideration of Mr. Justice Story in *U. S.* v. *Mayo,* 1 Gall. 397. He held that the phrase 'Revenue Laws' as used in the Act of 1804 meant such laws as are made for the direct and avowed purpose of creating revenue or public funds for

> the service of the government. The same doctrine was reaffirmed by that eminent judge in *U. S.* v. *Cushman,* 3 Sumn. 426. These views commend themselves to the approbation of our judgment."

At the time the Indictment charges the commission of the alleged offenses by the plaintiff in error there was in effect, and for that matter there still is in effect, what is popularly known as the War Time Prohibition measure. Since the enactment of this measure no licenses could be had, no bond could be given for the distillation of intoxicating liquors, and no revenue could be received or collected by the Internal Revenue Department for the sale or distillation of such liquors. In other words, in respect to these matters the Internal Revenue Act was suspended or superseded, and consequently there could be no criminal prosecution for a failure to comply with its requirements. In this connection another suggestion seems to be pertinent. In the year 1915 the State of Washington (Laws of 1915, page 1) enacted a sweeping prohibition measure, which became effective and operative on January 1, 1916. Subsequently the Congress of the United States, under date of March 3, 1917, enacted a law, commonly known as the Reed Amendment, the purpose of which was to enable the State of Washington and other states similarly situated to more effectively enforce its prohibition laws and which impliedly repealed the Internal Revenue Laws as far as the State of Washington was concerned. After the enactment of the Reed Amendment no one in the State of Washington could secure from the

Internal Revenue Department of the United States any license, authority or permission to manufacture or sell intoxicating liquors. The clearly expressed purpose of the Reed Amendment was to aid the several states in the enforcement of their prohibition measures and leave to them prosecution and punishment for all violations or infractions of the liquor laws. It would be a legal absurdity to contend that a man could be punished criminally for failure to secure a license or give a bond for the manufacture or sale of distilled liquors when the law would not permit the receiving of such a bond or the granting of such a license.

II.

After a denial of the motion to quash the indictment, and in due season, the plaintiff in error interposed a motion requiring the plaintiff to elect whether it would proceed to try him under the indictment in the present case or would proceed with and try the proceeding then pending for the condemnation of the property seized by the internal revenue officers at the time of his arrest. Both proceedings were based upon and grew out of the same state of facts, and it was the contention of the plaintiff in error before the lower court and he contends here that the Government could not inaugurate and prosecute the criminal action and the condemnation proceedings at the same time but must elect which one it would prosecute to a finality when a motion was interposed for that purpose. It has long been the settled law of this country that the Government for any infraction of the Internal

Revenue Laws is limited to a choice of one of two proceedings. It may proceed criminally under the penal clauses of the act or it may disregard those penal clauses and proceed in a civil action to collect the penalties or condemn and sell the property of the defendant, but it cannot follow both clauses at the same time. In *U. S.* v. *One Distillery,* 43 Fed. 816, it is held that if an officer and stockholder of a corporation engaged in distilling is convicted for a violation of the Internal Revenue Law, an action cannot be maintained to enforce the forfeiture of the corporation's property for the same offense, even though the forfeiture is resisted only by the other stockholders, and in the opinion it is said:

> "The case of *U. S.* v. *McKee,* 4 Dill. 128, was a civil action brought by the Government to recover the liability denounced by section 3296 of the Revised Statutes of double the amount of taxes of which the United States had been defrauded by the unlawful removal of whisky from the distillery of various persons, in which removals it was charged the defendant aided and abetted. The defendant interposed two defenses, one that he had been theretofore indicted, convicted and punished for the same offenses; two, that those offenses had been pardoned by the President. To that answer the Government demurred. Mr. Justice Miller, with whom concurred Judge Dillon, in overruling the demurrer held that if the specific acts of removal on which the civil suit was brought were the same which were proved in the Indictment, the former conviction and judgment constituted a bar to the civil suit on the ground that our laws forbid that any one shall be twice punished for the same crime or misdemeanor. That case was cited with an apparent

> approval by the Supreme Court in *Coffey* v. *United States,* 116 U. S. 445. The circumstance that the civil suit was under one section of the Revised Statutes and the criminal prosecution under another was not considered to affect the question nor is any reason perceived why it should. The decision was based upon the averments that both proceedings were for the same acts or transactions. If the Government cannot be permitted to maintain a civil action for the recovery of money denounced as a penalty for a violation of one of the sections of the statute where the same party had been previously prosecuted, convicted and punished for the same acts and transactions under another section, it would seem for the same reasons to follow necessarily that the Government cannot be permitted to maintain a civil action for the forfeiture of the property of a person for the acts or transactions for which it has previously prosecuted, convicted and punished."

In a later case, *U. S.* v. *Shapleigh,* 54 Fed. Rep. 126, the same doctrine is announced as follows:

> "Where provision is made by statute for the punishment of an offense by fine or imprisoment and also for the recovery of a penalty for the same offense by civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceedings."

In the present instance the criminal proceeding and the civil proceeding were each admittedly based upon the same state of facts. It would seem to follow, therefore, that the Government when seasonably challenged should have been required to elect whether to

proceed with the criminal prosecution or with the civil proceeding to condemn and sell the property of the plaintiff in error.

We submit that the judgment of the lower court should be reversed and this cause remanded with instructions to dismiss the same.

Respectfully submitted,

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